IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.695 OF 1999

1. Mahendra Chimanlal Vakharia
2. Smt.Meena Mahendra Vakharia ...Petitioners

Vs.

1. Competent Authority,
2. The Appellate Tribunal
3. Union of India ...Respondents

Mr.I.P.Bagaria for the Petitioners
Mr.D.A.Nalavade for Respondent No.3
Mr.B.R.Patil, A.P.P.

CORAM: SMT.RANJANA DESAI &
A.S.OKA,JJ.
DATE : SEPTEMBER 23, 2004.

ORAL JUDGMENT :

1. By this Petition under Article 226 of Constitution of India the Petitioners have taken exception to the order dated 26th December 1995 passed by the Competent Authority, SAFEMA/NDPS (constituted under the Foreign Exchange Regulation Act) under Section 7 of Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act,1976 [hereinafter referred to as the SAFEMA (FOP) Act] and the order dated 7th April 1999 passed by the Appellate Tribunal confirming the said order dated 26th December 1995. By the impugned order the Competent Authority directed the forfeiture of a Flat, a garage and two bank accounts and four life insurance policies standing in the name of the Petitioners. The two of the four policies are for the

benefit of minor children of the Petitioners. The order relates to forfeiture of two flats and an office standing in the name of the Petitioner No.1's brother and sister-in-law.

2. The Petitioner No.1 was ordered to be detained under CAFEPOSA by order dated 25th November 1994 issued by the Government of India. The said order of detention has neither been revoked nor quashed by any Court of competent jurisdiction. A show cause notice dated 28th September 1995 was issued to the Petitioners calling upon them to show cause as to why their properties more particularly mentioned in the notice should not be forfeited under Section 7 of SAFEMA (FOP) Act. No reply was sent to the said notice. A notice was also issued to the relatives of the Petitioners Smt. Kashmira Deepak Vakharia and Deepak Vakharia. The Competent Authority held that none of the persons on whom notice was served led any evidence to show the source from which they have acquired property described in the notice. It was also held that the Petitioner No.2 failed to produce evidence to show that she has her own separate income and that the acquisition of the property in her name has no nexus with the activities of the Petitioner No.1.

3. The Petitioners filed separate Appeals before the Appellate Tribunal for challenging the order passed by the Competent Authority. The the Appellate Authority by a reasoned order dismissed the said Appeals.

4. Shri Bagaria the learned Counsel appearing for the Petitioners submitted that both the Authorities have not considered the documentary evidence produced by the Petitioners. He submitted that the material piece of documentary evidence in the form of cash book of Guardian Diamond Company which was maintained in regular course of business and the audit report have been ignored by the Competent Authority as well as the Appellate Authority. He relied upon a xerox copy of the statement of loan accounts of M/s. Guardian Diamond Company with the Syndicate Bank, Santacruz (East), Mumbai. He contended that the Petitioner no.1 is a Partner of M/s. Guardian Diamond Company and the amount for acquiring the property has been disbursed from the loan account of the said Guardian Diamond Company. He submitted that the case made out by the Petitioners has been disbelieved by the Appellate Tribunal by holding that the extract of account of the said company in Syndicate Bank was not produced by the Petitioners. He submitted that as the extract has now become available a copy of which has been annexed to the petition, the matter may be remanded to the Appellate Authority for consideration of the said extract. The learned Counsel for the Respondents have supported the impugned orders and submitted that the orders are based on the material on record and the same are not perverse.

5. We have carefully considered the rival submissions. The

case of the Petitioners made out before the Appellate Authority appears to be that the Flat No.1101 and garage in Wallace Apartment were acquired by the Petitioners in their joint name for the price of Rs.18,29,401/-. The amount of price has been paid by instalments. The case of the Petitioners appears to be that the price of the said flat and garage has been paid from the capital account of the Petitioners in their firm M/s.Guardian Diamond Company. The said Guardian Diamond company had taken a credit facility from the Syndicate Bank and according to the Petitioners immediate source of payment of price of the flat and garage can be traced to the said bank account in Syndicate Bank.

6. The Appellate Authority recorded a finding that even the Petitioners admitted before the Competent Authority that the immediate source of payment of price of the flat cannot be traced to the said bank loan. The Appellate Authority found that the Petitioners have not led any evidence to show that all the instalments of price of flat and garage were paid from the loan account in the Syndicate Bank and extract of the bank account has not been filed.

7. We have perused xerox copy of the alleged extract of bank account of M/s.Guardian Diamond Company. The said xerox copy does not bear certificate of the Competent Officer of the Syndicate Bank as contemplated by the provisions of Bankers' Books Evidence Act, 1891. Moreover, there is no explanation

whatsoever in the Petition as to why the said extract of account was not produced by the Petitioners either before the Competent Authority or at least before the Appellate Authority. In absence of any such explanation, the Petitioners cannot be allowed to produce the said extract for the first time in the Writ Petition under Article 226 of Constitution of India when the Petitioners had ample opportunities to produce the said extract before the Authorities.

8. Shri Bagaria the learned Counsel for the Petitioners invited our attention to the averments made in paragraph No.8 and contended that substantial part of the amount of price has been paid from the said account in Syndicate Bank. From paragraph No.8 of the Petition it appears that even according to the case of the Petitioners, on 25th October 1985 a sum of Rs.7,00,000/- is paid by the Pay Order issued by the Syndicate Bank towards the payment of price of the flat. There is nothing on record to show that the amount of Rs.7,00,000/- was transferred from the account of M/s.Guardian Diamond Company. There is no explanation from the Petitioners about source of the said amount of Rs.7,00,000/-. The paragraph No.8 of the Petition also discloses that the total sum of Rs.5,50,000/- has been paid by two separate cheques in the sum of Rs.2,50,000/- and Rs.3,00,000/- respectively which were drawn on Bank of India, Opera House Branch, Mumbai. There is no explanation for the

source of the said amounts. Going by averments in paragraph No.8 of the Petition, out of total payment of Rs.17,50,000/- made by the Petitioners on account of price, only a sum of Rs.5,00,000/- has been paid by cheques drawn on Syndicate Bank,Worli Branch, Mumbai. It is pertinent to note that in paragraph No.8 of the Petition, details of total payment of Rs.17,50,000/- are mentioned though total price of the flat and garage was according to the Petitioners was Rs.18,29,401/-.

9. The Appellate Authority has observed that in the personal balance sheet of the Petitioners borrowing from the friends and relatives are shown which are capitalized in the account of the Company. The Appellate Authority has also observed that at least two cheques have been drawn by the Petitioners on Bank of India. A Statement of accounts or extract of the account of Bank of India has not been produced. No attempt has been made to produce the extract of the said account even along with this Petition.

10. In so far as Life Insurance Policies are concerned the Appellate Authority has considered the case of the Petitioners. The Appellate Authority has held that the Petitioners have not established that the money utilized for the payment of premium have come from a legitimate source.

11. It is to be borne in mind that while deciding this

Petition for writ of certiorari under Article 226 of Constitution of India this Court cannot act an Appellate Authority. Both the Authorities have considered the material placed before them. The Appellate Authority has given detailed reasons for discarding the case made out by the Petitioners. We find that there is no error of the jurisdiction and the reasons given are not perverse. In view of Section 8 of the SAFEMA (FOP) Act, the entire burden of proof was on the Petitioners. The Authorities and in particular the Appellate Authority has considered the question whether the said burden is discharged by the Petitioners by producing adequate evidence. When the entire evidence and material produced by the Petitioners was considered and appreciated by the Appellate Authority, while deciding the Petition under Section 226 of Constitution of India, we cannot re-appreciate the evidence and material which was before the Appellate Authority.

12. There is no merit in this Petition. Petition is dismissed. Rule is discharged with no order as to costs.

(SMT.RANJANA DESAI,J.)

(ABHAY S.OKA,J.)